Supreme Court, U.S.
FILED

931658 APR 20 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1993

REGINALD THADDEUS GILBERT-BEY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL E. STARR*
POTTER, MINTON, ROBERTS, DAVIS & JONES, P.C.
P.O. Box 359
Tyler, Texas 75710
(903) 597-8311

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

73 pp

QUESTIONS PRESENTED

Did the United States Court of Appeals for the Fifth Circuit err by failing to reverse the trial court's decision to overrule the Petitioner's motions to suppress evidence seized in violation of his right against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution?

Did the court of appeals err by failing to reverse the trial court's decision to overrule the Petitioner's motion for mistrial following Agent Black's prejudicial, inappropriate and incorrect statement that the Petitioner was a "known distributor" of illegal drugs?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

A. Procedural History 3

B. Summary of the Facts 5

REASONS FOR GRANTING THE WRIT 11

First Point of Error

THE UNITED STATES COURT OF APPEALS ERRED BY FAILING TO REVERSE THE TRIAL COURT'S DECISION TO DENY THE PETITIONER'S MOTIONS TO SUPPRESS APPROXIMATELY 10 KILOGRAMS OF COCAINE SEIZED IN VIOLATION OF THE PETITIONER'S RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 11

A. Standing 11

B. Pretext Stop 13

C. The Seatbelt Law 15

TABLE OF CONTENTS – Continued

Page

Second Point of Error

THE UNITED STATES COURT OF APPEALS ERRED BY FAILING TO REVERSE THE TRIAL COURT'S DECISION TO DENY THE PETITIONER'S MOTION FOR MISTRIAL FOLLOWING AGENT BLACK'S INCORRECT, INAPPROPRIATE AND PREJUDICIAL STATEMENT THAT THE PETITIONER WAS A "KNOWN DISTRIBUTOR" OF DRUGS 16

A. The Statement 17

B. The Cross-Examination 18

C. Substantial Impact 18

CONCLUSION 20

APPENDIX A-1

TABLE OF AUTHORITIES

Page

I. CASES:

Bumper v. North Carolina, 391 U.S. 543 (1968) 12

Florida v. Royer, 460 U.S. 491 (1983) 12

Katz v. United States, 389 U.S. 347 (1967) 13

Rakas v. Illinois, 439 U.S. 128 (1978) 13

Schneckloth v. Bustamonte, 412 U.S. 218 (1972) 12

Terry v. Ohio, 392 U.S. 1 (1968) 12

United States v. Boruff, 909 F.2d 111 (5th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991) 11

United States v. Cannon, 15 F.3d 896 (9th Cir. 1994) 14

United States v. Cummings, 920 F.2d 498 (8th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 428, 116 L.Ed.2d 448 (1991) (White, J., dissenting from denial of certiorari) 14

United States v. Ferguson, 8 F.3d 385 (6th Cir. 1993) (*en banc*) 14

United States v. Gallo, 927 F.2d 815 (5th Cir. 1991) 14

United States v. Gonzalez Basulto, 898 F.2d 1011 (5th Cir. 1990) 12

United States v. Guzman, 864 F.2d 1512 (9th Cir. 1988) 14

United States v. Hassan El, 5 F.3d 726 (4th Cir. 1993), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 1994 W.L. 96102 (1994) 14

United States v. Klein, 546 F.2d 1259 (5th Cir. 1977) 19

United States v. Kye Soo Lee, 898 F.2d 1034 (5th Cir. 1990) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Merida, 765 F.2d 1205 (5th Cir. 1985) 18

United States v. Smith, 517 F.2d 710 (5th Cir. 1975) 19

United States v. Smith, 799 F.2d 704 (11th Cir. 1986) 14

United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989), *appeal after remand*, 925 F.2d 1064, *cert. denied*, ___ U.S. ___, 112 S.Ct. 428, 116 L.Ed.2d 448 (1991) 14

United States v. Turner, 928 F.2d 956 (10th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 230 (1991) 12

Wong Sun v. United States, 371 U.S. 471 (1963)..... 12

II. CONSTITUTION:

U.S. CONST. amend. IV ..... *passim*

III. STATUTES AND RULES:

18 U.S.C. § 1952 (Supp. 1992)..... 3

21 U.S.C. § 841(a)(1) (1981) 3

21 U.S.C. § 841(b)(1)(A) (Supp. 1994)..... 3

21 U.S.C. § 846 (Supp. 1994)..... 3

28 U.S.C. § 1254 (1993) 2

28 U.S.C. § 1291 (1993) 4

TEX. REV. CIV. STAT. ANN. art. 6701d, § 107C(b) (Vernon Supp. 1994)..... 15

Supreme Court Rule 13.1 .....2, 4

No. _____

In The

Supreme Court of the United States

October Term, 1993

REGINALD THADDEUS GILBERT-BEY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

Petition For Writ Of Certiorari
To The Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Reginald Thaddeus Gilbert-Bey, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, rendered in this proceeding on December 3, 1993. The court of appeals denied the Petition for Rehearing of the Petitioner on January 20, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, ___ F.3d ___. (5th Cir. 1993), is reprinted at Appendix A-1.

The Memorandum Opinion of the United States District Court for the Eastern District of Texas, Tyler Division and following supplemental order are reprinted at Appendix A-18 and A-34.

The ruling of the United States District Court on the Petitioner's Motion for Mistrial is reprinted at Appendix A-45.

The Order of the United States Court of Appeals for the Fifth Circuit denying the Petition for Rehearing of the Petitioner is reprinted at Appendix A-47.

JURISDICTION

Rule 13.1 of the Supreme Court Rules and 28 U.S.C. § 1254 provide jurisdiction in this case and entitle the Petitioner to seek review of the decision of the United States Court of Appeals for the Fifth Circuit, affirming the trial court's decision to overrule the Petitioner's motions to suppress evidence and motion for mistrial, and to enter judgment of conviction. The Fifth Circuit Court of Appeals denied the Petition for Rehearing of the Petitioner on January 20, 1994.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV (in pertinent part):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

STATEMENT OF THE CASE

A. Procedural History

The United States District Court for the Eastern District of Texas possessed jurisdiction over this prosecution for possession of cocaine based on charges that the Petitioner violated 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 18 U.S.C. § 1952. This case was tried to a jury on a superseding indictment filed on June 17, 1992, in Cause No. 6:92cr24(2) before the Honorable William Wayne Justice, District Judge. The Petitioner and Co-defendant, Rosie Gonzales Delapaz, were named in the superseding indictment. The Petitioner pleaded not guilty, and trial began on January 19, 1993. Delapaz reached an agreement with the government and pleaded guilty and was sentenced on August 24, 1992.

Prior to trial, the Petitioner filed a Motion to Suppress cocaine seized during a routine traffic stop by Deputy Paul Beatty of the Panola County Sheriff's Department (1 Rec. 247).[1] The district court denied

[1] The record on appeal is contained in ten volumes which will be referred to with citations in the following form: volume number, "Rec.," and page number.

the Petitioner's motion and entered an order and memorandum opinion. (1 Rec. 199, 183) *See* Appendix pp. A-18 – A-33. The Petitioner later filed a Supplemental Motion to Suppress which was also denied. (1 Rec. 140; 87) (*See* Appendix pp. A-34 through A-36).

At the close of the prosecution case, the Petitioner made a motion for acquittal and reurged his motion for mistrial which had first been made earlier because of the incorrect, prejudicial statements of a prosecution witness. Both motions were overruled (10 Rec. 21-22). At the close of the Petitioner's case, he moved for instructed verdict on the same grounds as the motion for acquittal. The district court also denied that motion.

The case was submitted to the jury on January 20, 1993. The jury returned a verdict of guilty on all counts. The Petitioner was sentenced on April 9, 1993. The court signed its Judgment in a Criminal Case on the same date. The Petitioner timely filed his notice of appeal to the United States Court of Appeals for the Fifth Circuit on April 9, 1993. The Petitioner preserved constitutional error in his brief to the United States Court of Appeals for the Fifth Circuit where jurisdiction was proper pursuant to 28 U.S.C. § 1291. All points were addressed and ruled upon by the court of appeals in its opinion of December 3, 1993, attached as Appendix pages A-1 through A-17. The court of appeals denied the Petitioner's Petition for Rehearing on January 20, 1994. *See* Appendix p. A-47. This Petition for Writ of Certiorari is timely filed in accordance with Rule 13.1 of the Supreme Court Rules.

B. Summary of the Facts

1. *Factual background.* This prosecution arose from the seizure of approximately ten kilograms of cocaine from a rental vehicle which the Petitioner was driving with the permission of his co-defendant, Rose Gonzales Delapaz ("Delapaz"), and the renter under the rental agreement, Norma Cisneros. The Petitioner and Delapaz were accused of conspiring to possess with intent to distribute and actual possession with intent to distribute cocaine in an amount greater than five kilograms. The Petitioner and Delapaz were also accused of travelling in interstate commerce with the intent to promote, manage, establish, and carry on an unlawful activity and of performing and attempting to perform acts to promote, manage, establish, and carry on an unlawful activity.

The Petitioner and Delapaz, along with the Petitioner's companion, Toni Riggs, travelled from Michigan to Houston, Texas, by airplane in April, 1992. After arriving at the airport, they obtained a rental car with the help of Cisneros, the designated renter on the rental agreement. The Petitioner drove the rental vehicle with the knowledge and consent of Cisneros, even though his name was not listed as an authorized driver.[2]

---

[2] At the hearing on Defendant's Supplemental Motion to Suppress, the evidence was undisputed that the defendant did not qualify as an authorized driver of the rental vehicle under the terms of the rental agreement. *See* 1 Rec. 87-88. However, the testimony of Delapaz and Cisneros established that Cisneros was aware of and consented to the defendant's operation of the rental vehicle (5 Rec. 9-10, 22; 10 Rec. 31-32).

After spending several days in Houston during which the Petitioner and Riggs occupied themselves with shopping and other entertainment, Riggs departed from Houston by airplane, and the Petitioner and Delapaz left Houston travelling north on U. S. Highway 59 in the rented vehicle on April 27, 1992. At a point after reaching a plea agreement with the United States, Delapaz testified that the Petitioner was aware of her plans to obtain cocaine in Houston from two individuals known to her as Rosando Ruiz and "Angel." However, during his testimony at the hearing on his Supplemental Motion to Suppress, the Petitioner denied any knowledge of the presence of cocaine in the trunk of the rented vehicle.

When they reached Carthage, Texas, just before midnight, the Petitioner and Delapaz were stopped by Deputy Paul Beatty of the Panola County Sheriff's Department. Beatty testified that he noticed that Delapaz was not wearing her seatbelt.[3]

After continuing in a different direction for a short distance, Beatty turned his car around and stopped the rented Lincoln occupied by the Petitioner and Delapaz.

After explaining the reason for the stop, Beatty requested the Petitioner's driver's license and the rental agreement and asked the occupants their point of origin and destination. Beatty then asked the Petitioner to step to the rear of the car. When the Petitioner complied, Beatty asked other questions regarding the Petitioner's

---

[3] Even after reaching a plea agreement with the government, Delapaz testified that she was, in fact, wearing her seatbelt (10 Rec. 71).

relationship to Delapaz. Beatty then approached the passenger side of the car and asked Delapaz for her license. The officer noticed that Delapaz seemed nervous to him as she looked for her license which he had observed immediately when she began to search through her wallet. He also asked her about her relationship with the Petitioner. Beatty then returned to the Petitioner and inquired about the duration of their trip. The Petitioner informed him that he needed to be back in Michigan on the next Monday.

At this point Beatty asked the Petitioner whether the occupants had any luggage. The Petitioner stated that he had a bag in the back seat but that Delapaz did not have any luggage. Beatty then asked the Petitioner whether there were any weapons or alcohol in the car. The Petitioner replied that there were not.

Beatty then turned his attention to the trunk and inquired of the Petitioner about its contents. The Petitioner replied that the trunk contained some toys which he and Riggs had purchased in Houston, Texas. The deputy asked for permission to "look" in the trunk, and the Petitioner allegedly replied "sure." During his testimony at a hearing on preliminary motions, the Petitioner denied that the officer had requested or that he had granted permission to search the trunk (7 Rec. 44). Beatty testified that after his request, the Petitioner informed Delapaz that Beatty wanted to look in the trunk, and that she released the trunk lid by pressing a button in the glove compartment. The Petitioner also disputed this testimony. He testified that the deputy turned the ignition key and pressed the button himself. Delapaz testified that

the deputy told her to open the trunk as opposed to asking her permission to do so (10 Rec. 73).

After the trunk was open, Beatty conducted a search of the trunk. At a hearing on preliminary motions the Petitioner testified that he backed away from the trunk after the deputy had opened it. Beatty, on the other hand, testified that the Petitioner helped him by displaying certain items in the trunk. Beatty noticed two duffel-type bags which the Petitioner did not show him, however. When he asked the Petitioner specifically about the bags, the Petitioner backed away from the trunk and put his arms up.[4]

Beatty then unzipped the closed bags and discovered brick-like packages in yellow cellophane wrappers. The Petitioner and Delapaz were then placed under arrest and the packages were field tested to confirm the nature of the substance they contained.

After being transported to the Panola County Sheriff's Office, the Petitioner asked to speak with Beatty without Delapaz knowing that he had done so. After conversing briefly, Beatty informed the Petitioner that officers with the Drug Enforcement Agency were on their way to Carthage from Tyler, Texas, and that he could speak with them. As a matter of standard procedure because of the size of the seizure, Agent Paul Black and Agent Jesse Howard were called. Beatty testified that he

---

[4] During his testimony at the first suppression hearing, Beatty testified that the Petitioner made the following reply when the deputy moved to examine the duffel bags: "That's all there is," or "That's it." (2 Rec. 37).

wanted to wait for the federal agents because the Petitioner began to describe a drug operation which involved obtaining ten kilograms of cocaine from a Columbian in South Texas after paying $30,000 front money. Again, in his testimony in support of a motion to suppress the alleged confessions, the Petitioner denied any cooperation with Beatty or the federal agents.

In the presence of Howard and Black, the Petitioner made a series of phone calls to the state of Michigan. The prosecution maintained that the Petitioner placed these calls in an attempt to cooperate in setting up a "controlled delivery" for the purpose of identifying the intended recipients of the seized cocaine. The transcript of the phone calls provided to the jury at trial did not expressly mention any transaction involving cocaine. The agents contended that persons involved in drug operations do not use explicit language in discussing proposed transactions.

After the interviews on April 28, 1992, the grand jury returned an indictment on May 29, 1992. Subsequently a superseding indictment was returned on June 16, 1992.

2. *Agent Black's errant and inadmissible statement.* At the close of the first day of the Petitioner's trial, Black made the following statement on cross-examination:

> Q [The tape of the phone conversation with Walter Harris] doesn't say anything about drugs there, does it?
>
> A Sir, in drug terminology and drug slang, that would mean: Is it tight up there? Meaning, do you have anything or is there not any cocaine or is there not any heroin or is

there not any marijuana on the street available that would – that is exactly what that would mean.

Q It could also be talking about jobs?

A No, sir, not in this situation.

Q It could not?

A No, sir, it is a documented fact that Mr. Walter Harris was a known distributor, as well as Mr. Gilbert-Bey.

Q Excuse me, sir?

A Mr. –

(9 Rec. 191). The district court excused the jury for the evening without further questions in the presence of the jury. Black attempted to explain to the court that he had referred only to the Petitioner's self-"documentation" in the form of confessions. The Petitioner moved for a mistrial, and the court took that motion under advisement. The next morning, the court denied the Petitioner's motion for mistrial. The court offered to give a limiting instruction while cautioning the Petitioner that such instruction could serve merely to reinforce Black's statement in the minds of the jury. The Petitioner elected not to have the jury instructed, and the Petitioner's counsel inquired further about Black's statement when cross-examination resumed.

REASONS FOR GRANTING THE WRIT

First Point of Error

THE UNITED STATES COURT OF APPEALS ERRED BY FAILING TO REVERSE THE TRIAL COURT'S DECISION TO DENY THE PETITIONER'S MOTIONS TO SUPPRESS APPROXIMATELY 10 KILOGRAMS OF COCAINE SEIZED IN VIOLATION OF THE PETITIONER'S RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Standing

The trial court concluded that the Petitioner did not possess standing to complain about any constitutional infirmity with the search which produced the cocaine because the Petitioner was driving a rental vehicle and was not listed as an authorized driver on the rental contract. Furthermore, the contract prohibited use of the vehicle by persons not authorized under the contract. The trial court relied on *United States v. Boruff*, 909 F.2d 111 (5th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991) to conclude that the Petitioner did not have standing. The United States Court of Appeals for the Fifth Circuit discussed the issue of the Petitioner's standing but held that it need not reach a conclusion because the passenger of the vehicle, Delapaz, voluntarily consented to the search.

The issue of the Petitioner's standing should be addressed by this Honorable Court because it is an important Fourth Amendment question not previously addressed by this Court. The issue of the Petitioner's standing is relevant because even if the passenger voluntarily consented to an officer's search, that consent was

the fruit of an illegal pretextual stop as discussed below. *Wong Sun v. United States*, 371 U.S. 471 (1963). Furthermore, neither the Petitioner nor the passenger voluntarily gave consent for the search.[5] Finally, any consent given by Delapaz was the fruit of illegal questioning by the officer concerning the presence of weapons in the vehicle. *United States v. Turner*, 928 F.2d 956, 959 (10th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 230 (1991).

The United States Court of Appeals for the Fifth Circuit was on the verge of concluding that the Petitioner possessed the reasonable expectation of privacy necessary to have standing to challenge the search of the rental vehicle which he was not contractually authorized to drive. The evidence did not show that the Petitioner was aware of the restrictions on the rental contract. It did show that he drove the rental vehicle with the knowledge and consent of the renter, Cisneros, and with the knowledge and consent of Delapaz, the only other contractually authorized driver.

---

[5] The government failed to show that the consent of Delapaz was freely and voluntarily given based on the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1972). The government must prove voluntariness by a preponderance of the evidence. *Bumper v. North Carolina*, 391 U.S. 543 (1968). Consent to search is neither voluntary nor valid when it is obtained during an investigative detention which, although it may have begun legally, becomes an illegal arrest. *Florida v. Royer*, 460 U.S. 491, 502 (1983). In this case, the scope of the traffic stop was not reasonably related to the circumstances which were alleged to justify the initial intrusion. *Terry v. Ohio*, 392 U.S. 1, 19 (1968). Furthermore, the preponderance of the evidence demonstrated that the alleged consent of the Petitioner and the alleged consent of Delapaz were not voluntary based on the factors set out in *United States v. Gonzalez Basulto*, 898 F.2d 1011, 1012-13 (5th Cir. 1990) (citations omitted).

The Fourth Amendment to the United States Constitution protects those expectations of privacy that society is prepared to recognize as "reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967). To have Fourth Amendment standing, a defendant must show (1) an actual, subjective expectation of privacy with respect to the place being searched or items be seized and (2) that the expectation is one that society would recognize as reasonable. *United States v. Kye Soo Lee*, 898 F.2d 1034, 1037-38 (5th Cir. 1990) (*citing Rakas v. Illinois*, 439 U.S. 128 (1978)). The court of appeals was destined for the proper conclusion that the Petitioner did possess a reasonable expectation of privacy in the rented vehicle he was given permission to drive, and the court erred by failing to decide that question.

B. Pretext Stop

The United States Court of Appeals for the Fifth Circuit addressed the question of the pretextual nature of the stop in this case in its analysis of the voluntariness of the consent of the passenger, Delapaz. The Petitioner raised the question of the illegality of the stop in his brief to the court of appeals. This Honorable Court should grant a writ of certiorari in this case because there is a disagreement among the United States Courts of Appeals concerning whether a law enforcement officer may stop a vehicle under the pretext of a traffic violation when the officer's actual purpose is to conduct a search for illegal drugs or other contraband.

The United States Court of Appeals for the Fifth Circuit has adopted the "could have" standard for

analyzing the legality of traffic stops under the Fourth Amendment. Under the "could have" standard, if any legitimate reason exists for the stop, it may not be impugned as pretextual. *United States v. Gallo*, 927 F.2d 815, 818-19 (5th Cir. 1991). This standard is also followed in the Fourth Circuit, Sixth Circuit, Seventh Circuit, and Eighth Circuit.[6] Other circuits have adopted a "would have" test which is a more stringent standard. Although the "would have" standard does not examine the subjective intent of the officer in making the stop, it does inquire into the officer's conformity with regular police practices. If a reasonable officer would have made the stop, absent his unrelated suspicions, the stop is not pretextual. *United States v. Cannon*, 15 F.3d 896 (9th Cir. 1994). In addition to the Ninth Circuit, the Eleventh Circuit has also adopted this standard.[7]

The evidence in this case suggests that a reasonable officer would not have stopped the Petitioner based on the failure of the passenger in the rental vehicle to wear a seatbelt. The totality of the circumstances indicate that it was not regular police procedure to stop for that violation

---

[6] *See, e.g., United States v. Hassan El*, 5 F.3d 726, 729-31 (4th Cir. 1993), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 1994 W.L. 96102 (1994); *United States v. Ferguson*, 8 F.3d 385, 388-93 (6th Cir. 1993) (*en banc*); *United States v. Trigg*, 878 F.2d 1037, 1038-43 (7th Cir. 1989), *appeal after remand*, 925 F.2d 1064, *cert. denied*, ___ U.S. ___, 112 S.Ct. 428, 116 L.Ed.2d 448 (1991); *United States v. Cummings*, 920 F.2d 498 (8th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 428, 116 L.Ed.2d 448 (1991) (White, J., dissenting from denial of certiorari).

[7] *See, e.g., United States v. Guzman*, 864 F.2d 1512, 1515 (9th Cir. 1988); *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986).

in the middle of the night, despite the technically legal basis to do so provided by Texas traffic laws. Furthermore, although not directly relevant to the "would have" standard, there is testimony to indicate that the officer who made the stop in this case intended to stop vehicles for the purpose of searching them.

Under the law of this land as currently interpreted by the different United States Courts of Appeals, the nature of the Petitioner's right to be free from unreasonable search and seizure is variable depending on the state in which he is driving. This issue requires an opinion by this honorable Court to unify the federal circuits under the standard adopted by the Court of Appeals for the Ninth Circuit.

The United States Court of Appeals for the Fifth Circuit erred in holding that the stop was consistent with the Petitioner's rights under the Fourth Amendment based on the officer's decision to stop the vehicle because of a violation of the Texas seatbelt law.

C. The Seatbelt Law

This Honorable Court should also grant a writ of certiorari in this case because the officer's questioning of the Petitioner and his passenger exceeded the scope of the basis for the initial stop, a breach of Texas Revised Civil Statutes Annotated article 6701d, section 107C(b) by the passenger. That statute requires the wearing of a safety belt if the driver or passenger occupies a seat equipped with one. However, it does not impose any penalty upon the driver of a vehicle based on a passenger's failure to comply.

When the stop in question was initiated, the Petitioner was in the position of a person having been stopped at random since there was no probable cause or reasonable suspicion that he had committed any crime, including the violation of any traffic law. Although an officer may be permitted to engage in some limited intrusive questioning during the mechanics of a traffic stop, that questioning should be limited even more severely when there is no probable cause or reasonable suspicion that the driver himself has committed any crime. As concluded by the trial court, the Petitioner was not free to abandon his passenger at the roadside in the middle of the night when that passenger had allegedly committed a traffic violation. Because the Petitioner was not free to leave, and because he was detained solely on the basis of an alleged traffic violation by Delapaz, the officer's questioning exceeded the scope of questions permissible during the mechanics of a routine traffic stop. The court of appeals erred in concluding that the stop and detention of the Petitioner was legal since that unreasonable seizure and the subsequent search were the fruit of the officer's intrusive questioning beyond the scope allowed by the Fourth Amendment to the United States Constitution.

Second Point of Error

THE UNITED STATES COURT OF APPEALS ERRED BY FAILING TO REVERSE THE TRIAL COURT'S DECISION TO DENY THE PETITIONER'S MOTION FOR MISTRIAL FOLLOWING AGENT BLACK'S INCORRECT, INAPPROPRIATE AND PREJUDICIAL STATEMENT THAT THE PETITIONER WAS A "KNOWN DISTRIBUTOR" OF DRUGS.

This case presents an important question of the administration of judicial proceedings in the United

States district courts. The Petitioner was denied his right to a fair trial when one of the witnesses for the prosecution injected an incorrect and prejudicial statement about the Petitioner. The Court should grant this writ because the United States Court of Appeals sanctioned the trial court's departure from accepted and usual judicial proceedings when it failed to reverse the trial court's decision to deny the Petitioner's motion for mistrial.

A. The Statement

During his cross-examination of Black, the Petitioner's trial counsel inquired whether the language used by the Petitioner during a telephone call might have referred to something other than drugs. Black responded, "No, sir, it is a documented fact that Mr. Walter Harris is a known distributor, as well as Mr. Gilbert-Bey." After the court had excused the jury for the evening without explanation of the statement or further testimony, Black attempted to explain his statement to the court. The Petitioner moved for mistrial, and the trial court took that motion under advisement.

The following morning, the trial court denied the Petitioner's Motion for Mistrial and inquired whether the defense would like the court to issue a limiting instruction. Although defense counsel initially accepted the court's offer, after conferring with the Petitioner, counsel informed the court that he would address the statement on cross-examination.

B. The Cross-Examination

When the jury returned, defense counsel cross-examined Black concerning his statement that the Petitioner was a "known distributor" of drugs. Black's response was to inform the court and jury that the Petitioner had admitted to being a distributor of drugs but conceded that the Petitioner had no criminal record involving drugs. Black stated that his information concerning the Petitioner's distribution of drugs was based upon what the Petitioner allegedly told him about this transaction. Black admitted that he made a false statement by referring to the Petitioner as a known distributor of drugs.

C. Substantial Impact

The decision of the trial court to deny the Petitioner's Motion for Mistrial was an abuse of discretion because Black's statement, viewed in the context of the entire trial, was so prejudicial "that it had a substantial impact on the verdict." *United States v. Merida*, 765 F.2d 1205, 1220 (5th Cir. 1985) (internal citation omitted). The court of appeals concluded that defense counsel cured any prejudice through cross-examination. *See* Appendix at A-15. However, that conclusion was incorrect because Black's statement was so prejudicial that it could not be cured by a limiting instruction or cross-examination. Defense counsel's attempt at cross-examination allowed Black to explain what he meant by the statement despite Black's admission that the Petitioner had no previous convictions for illicit drug-related activity. This admission, taken in the context of the entire trial, was insufficient to cure the problem. The jury heard Black's false

statement at the end of the first day of trial, and the trial court dismissed the jury without explanation immediately following the statement. When the jury returned, they heard Black's explanation of his comment on cross-examination.

The taint created by the implication that the Petitioner was a convicted criminal with a history of drug-related activity was substantial and affected the outcome of the trial. It is difficult to imagine a comment which would cause more extreme prejudice to the Petitioner than being falsely branded a repeat offender by a Drug Enforcement Agency officer. The comment was incurable by instruction or cross-examination, and the trial court abused its discretion by refusing to grant the Petitioner's Motion for Mistrial. Even if defense counsel had requested a limiting instruction, the statement was too prejudicial to be cured by such an instruction. *See United States v. Klein*, 546 F.2d 1259, 1262-63 (5th Cir. 1977); *United States v. Smith*, 517 F.2d 710, 711 (5th Cir. 1975).

By ignoring the true effect of Black's comments, the United States Court of Appeals sanctioned the trial court's abuse of discretion, and the Petitioner was denied a fair trial.

CONCLUSION

Because the United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the Fourth Amendment to the United States Constitution and with usual and accepted judicial proceedings, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL E. STARR*
POTTER, MINTON, ROBERTS, DAVIS
& JONES, P.C.
P. O. Box 359
Tyler, Texas 75710
(903) 597-8311

*Counsel of record

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4400
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REGINALD THADDEUS GILBERT-BEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(6:92-CR-24(2))

(Filed DEC 03 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

A jury found Defendant-Appellant Reginald Thaddeus Gilbert-Bey guilty of conspiracy to possess with intent to distribute cocaine, possession with intent to

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

distribute cocaine, and interstate travel to facilitate distribution of cocaine. On appeal Gilbert-Bey complains that the district court erred in failing to suppress evidence of cocaine found in the rental car he was driving; in failing to grant a mistrial; and in making an impermissible comment on the evidence in response to a question from the jury regarding the verdict form. Gilbert-Bey also claims that he received ineffective assistance from his trial counsel. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Panola County (Texas) Deputy Sheriff Paul Beatty testified that he and Panola County Detention Officer Brian Murph were on duty in and around Carthage, Texas, on the night of April 27-28, 1992. Beatty and Murph headed for a convenience store at about midnight to purchase soft drinks when they noticed a Lincoln Continental sedan on the road. Beatty could not see a license plate on the Lincoln. As the police neared the Lincoln, Beatty saw a paper license plate in the rear window of the car. He also noticed that the passenger in the Lincoln was not wearing a safety belt. According to Beatty, it is a violation of Texas law for an automobile passenger to ride without wearing a safety belt. Beatty decided to stop the Lincoln.

Gilbert-Bey, who was behind the wheel of the Lincoln, produced a Michigan driver's license. When Beatty explained Texas' safety-belt law to the occupants of the Lincoln, the passenger began to put on her safety belt. Failing to make eye contact with Beatty, the passenger

said something about going to visit her sister's house near Texarkana. Beatty asked where near Texarkana; the passenger said only "around Texarkana."

Gilbert-Bey told Beatty that the car was rented. Beatty asked to see the rental contract and also asked Gilbert-Bey to step out of the car and walk to the rear, and Gilbert-Bey complied. Beatty noticed that Gilbert-Bey was not listed on the rental contract, which struck Beatty as odd. The car was rented to a Norma Cisneros (Cisneros), and only Rosie Delapaz (Delapaz) was listed as an additional driver. When Beatty asked Gilbert-Bey where he and his passenger were traveling, he responded that they were traveling to the Texarkana area. He identified the passenger as his aunt, but did not give Beatty her name. Beatty then approached the passenger, intending to obtain her identity.

The passenger produced for Beatty a Michigan driver's license that identified her as Rosie Delapaz. She fumbled in her billfold and produced the license only after Beatty pointed it out to her. Delapaz still did not make eye contact with Beatty, who again asked her where around Texarkana she and Gilbert-Bey were traveling. She responded, "just around Texarkana," adding that she and Gilbert-Bey would be in Texarkana "until Friday." Delapaz told Beatty that Gilbert-Bey worked for her, but she did not identify Gilbert-Bey as her nephew.

Beatty returned to Gilbert-Bey who had remained at the rear of the Lincoln. Beatty was told by Gilbert-Bey that he worked at a firm named AdCom and that he needed to be back at work the following Monday. Gilbert-Bey did not identify Delapaz as his employer. He

explained to Beatty that Cisneros had rented the car because at the airport Delapaz had discovered that she had no credit cards. As he had seen two credit cards in Delapaz's billfold when he watched her search for her driver's license, Gilbert-Bey's explanation made Beatty suspicious.

When Beatty asked Gilbert-Bey if he had any luggage, he responded that he had a bag in the back seat of the car. Beatty then asked if Delapaz had any luggage, to which Gilbert-Bey responded in the negative. Beatty thought it odd that Delapaz would travel without clothing from Michigan to Houston to Texarkana for a four-day stay.

Beatty then asked Gilbert-Bey whether he and Delapaz were carrying any alcohol or weapons in the Lincoln, and Gilbert-Bey again responded in the negative. When Beatty inquired whether there was anything in the trunk, Gilbert-Bey responded that Delapaz had purchased some toys for her nieces and nephews.

According to Beatty, "[t]he hesitated responses in the questioning, the loss of eye contact, the actual totality of the stop made [m]e believe that something was occurring that wasn't right." Beatty therefore asked for permission to search the Lincoln. Gilbert-Bey responded "sure," and walked to the driver's side of the car. Beatty then asked specifically whether he could look in the trunk. Gilbert-Bey again assented, sticking his head into the driver's window and telling Delapaz, "[h]e wants to look in the trunk." Delapaz opened the glove compartment and pushed the trunk-release button.

Beatty and Gilbert-Bey returned to the rear of the Lincoln where Beatty looked in the trunk. He saw a box and some white plastic bags, which contained T-shirts and toys. He also saw two duffel bags in the front of the trunk, which bags appeared to be full. Gilbert-Bey explained the contents of the boxes and the white bags but not the contents of the duffel bags. In light of Gilbert-Bey's previous responses that his luggage was in the back seat and that Delapaz had no luggage, Beatty was curious about the contents of the duffel bags. Beatty asked Gilbert-Bey to whom the bags belonged, and without responding he [Gilbert-Bey] raised his hands and stepped back about one foot. Beatty then reached for one of the duffel bags, and it felt heavy. As Beatty pulled the bag forward, he noticed a hard object inside. He unzipped the bag and discovered a brick-like package wrapped with yellow cellophane.

Beatty directed Gilbert-Bey to place his hands on the hood of Beatty's patrol car. Beatty and Murph then handcuffed Gilbert-Bey. Murph remained with Gilbert-Bey as Beatty went to place Delapaz under arrest. Beatty informed Gilbert-Bey and Delapaz of their *Miranda* rights, then returned to the duffel bags in which he found ten brick-like packages (when the packages were examined they weighed 2.2 pounds each and tested positive for cocaine hydrochloride). Even though Beatty wrote no traffic tickets, he had been carrying a ticket book when he got out of his police car.

Beatty testified that a note was left for him by Gilbert-Bey in the booking room of the Panola County Jail, indicating that Gilbert-Bey wished to speak with Beatty. Shortly thereafter, Gilbert-Bey conversed with Beatty.

Gilbert-Bey did not want Delapaz to know that he was conversing with the deputy; he wanted to help himself by providing information to the authorities. He told Beatty that he and Delapaz had met a Colombian in Houston, and that the twosome "fronted" $30,000 to the Colombian in exchange for ten kilograms of cocaine. Gilbert-Bey and Delapaz planned to make a profit of $4,000 per kilogram delivered.

Tyler (Texas) Police Officer Paul Black, who was assigned to the Drug Enforcement Task Force, testified that he too had conversed with Gilbert-Bey at the Panola County Jail. Black advised Gilbert-Bey of his *Miranda* rights, which Gilbert-Bey waived. He related that he and Delapaz had flown from Detroit to Houston, where they were supposed to meet with two Colombians, one named Rosando and another named Angel. The purpose of the trip was to purchase cocaine. Once in Texas, Gilbert-Bey and Delapaz obtained a rental car and checked into a motel. They held meetings with Rosando and Angel. Gilbert-Bey was informed that Rosando and Angel obtained cocaine and marijuana from a candle-store owner in McAllen, Texas. The Colombians represented that they possessed 200 kilograms of cocaine and 5,000 pounds of marijuana. Gilbert-Bey and Delapaz were to take a quantity of drugs to Michigan for distribution. According to Gilbert-Bey, Delapaz handled the negotiations for both of them. Gilbert-Bey's role was limited to the transportation and distribution of the drugs which he expected to sell in Michigan for $500,000. He and Delapaz were to retain their share and return the rest of the proceeds to Houston.

Gilbert-Bey agreed to attempt a controlled sale to his Michigan contacts and a controlled delivery of funds to his Houston contacts. For reasons beyond Gilbert-Bey's control, however, the authorities were unable to arrange the proposed transactions.

Gilbert-Bey moved for acquittal after the government rested its case. The district court denied his motion. Gilbert-Bey renewed his motion for acquittal after the defense rested its case. The district court again denied his motion. Gilbert-Bey timely appealed.

II

ANALYSIS

A. Suppression of Evidence

Gilbert-Bey contends that the district court erroneously denied his pretrial motion to suppress the physical evidence taken from the Lincoln. He argues that he had standing to challenge the search of the Lincoln directly; that his detention and the search of the car were unreasonable; that his and Delapaz's consent to the search was involuntary; that the search exceeded the scope of consent; and that Delapaz's consent was the fruit of Beatty's illegal detention of Gilbert-Bey.

Beatty offered the same version of the facts at the suppression hearing that he later offered at trial. He was the only witness to testify at the suppression hearing. The district court denied Gilbert-Bey's motion. The court found that Gilbert-Bey lacked standing to challenge the search; that Delapaz voluntarily consented to open the

trunk; and that the search of the trunk and its contents was within the scope of Delapaz's consent.

Gilbert-Bey later moved to reopen the suppression hearing, contending that he had been unaware that standing would be at issue and that he wished to present evidence establishing his standing. The court reopened the hearing and heard testimony from Delapaz, Budget Rent-a-Car officer John Adams (Adams), and Gilbert-Bey. The district court denied Gilbert-Bey's motion, again finding that Gilbert-Bey lacked standing.

> In reviewing [a] district court's denial of [a] motion to suppress, this court must accept the district court's factual findings unless they are clearly erroneous or influenced by an incorrect view of law. The evidence is viewed in the light most favorable to the prevailing party, in this instance the government. Nevertheless, the ultimate question of the legality of the search or seizure of [the defendant's] car is a question of law alone and thus subject to *de novo* review.

United States v. Cooper, 949 F.2d 737, 744 (5th Cir. 1991) (footnotes omitted), *cert. denied*, 112 S.Ct. 2945 (1992).

We have twice discussed the standing of a defendant to challenge the search of a car that was rented to another person. In *United States v. Kye Soo Lee*, 898 F.2d 1034 (5th Cir. 1990), we held that two defendants had standing to challenge the search of a truck rented by another person but loaned to them by that person. *Id.* at 1037-38. The discussion in *Kye Soo Lee* does not indicate whether either defendant was contractually authorized to drive the truck. *Id.* at 1036-38. In *United States v. Boruff*, 909 F.2d 111 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 1620 (1991), we held

that a defendant had no standing to challenge the search of a car rented by another person but loaned to the defendant. In *Boruff*, the rental agreement authorized only the renter to operate the car, and gave the renter no authority to give control of the car to the defendant. Additionally, the agreement prohibited using the car for illegal purposes, and the defendant was aware of the contractual restrictions when he obtained the car. *Id.* at 113-14, 117. We found that under such circumstances the defendant had no reasonable expectation of privacy in the car. *Id.* at 117.

The rental contract for the Lincoln listed Cisneros as the renter. Delapaz was listed as the only other authorized driver. Cisneros and Delapaz signed both the contract and a notice regarding additional drivers. That notice bound both to the terms of the contract and made them jointly and severally liable for damage to the car. The contract explicitly prohibited Cisneros and Delapaz from allowing an unauthorized driver to drive the car and prohibited them from using the car for illegal activity, expressly including drug trafficking. The contract allowed for employers or co-workers of the renter to drive the car if engaged in business with the renter. Adams testified about the contents of the agreement.

The district court made no findings about Gilbert-Bey's knowledge of the restrictions in the rental contract. The strongest evidence of Gilbert-Bey's knowledge was Delapaz's testimony at the suppression hearing that Gilbert-Bey had arranged the rental and was with her when the agreement was executed. Gilbert-Bey denied having made the rental arrangements, however, and testified that

he was passing the time in the airport mall while Cisneros and Delapaz completed the rental arrangements.

The record does not indicate that Gilbert-Bey actually knew about the restrictions in the rental contract that barred Cisneros and Delapaz from allowing him to drive the car. The record does show, however, that Gilbert-Bey knew that the car was rented. *Boruff*, on its facts, addresses only the reasonable expectation of privacy of a defendant who knows that he is not authorized to drive a car rented to another person. It is arguable that no individual reasonably could harbor an expectation of privacy in a car that he knows is rented and that he is not authorized to drive. *Kye Soo Lee*, however, indicates that such an individual may harbor a reasonable expectation of privacy in such a vehicle. The vehicle in *Kye Soo Lee* was a truck rented from a major rental fleet. *Kye Soo Lee*, 898 F.2d 1037-38.

We need not determine whether Gilbert-Bey had standing to challenge the search of the car. As the district court found that Gilbert-Bey lacked an expectation of privacy in the Lincoln, it made no finding regarding Gilbert-Bey's consent to search the trunk. The district court found, however, that by opening the trunk while being legally detained, Delapaz – who clearly had authority under the contract – voluntarily consented to the search.

Police may rely on the voluntary consent of a person holding common authority over the place to be searched. *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).

> The voluntariness of [a] consent to . . . search is a question of fact determined by examining the totality of the circumstances. Six primary factors guide the district court in making this determination: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

United States v. Gonzalez-Basulto, 898 F.2d 1011, 1012-13 (5th Cir. 1990) (citations omitted). Being a question of fact, a finding of consent is reversible error only if clearly erroneous. *Id.* The district court's finding that Delapaz consented to the search is not clearly erroneous. Delapaz's custodial status was not voluntary. Beatty had pulled the Lincoln over for a traffic violation and could have written Delapaz a ticket; something he did not do.

The record reflects no coercive police procedures. First, Beatty did not detain Gilbert-Bey and Delapaz illegally. " '[W]here police officers are doing what they are legally authorized to do . . . the results of their investigations are not to be called into question on the basis of any subjective intent with which they acted.' " *United States v. Gallo*, 927 F.2d 815, 818 (5th Cir. 1991) (quoting *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc)). Texas requires car passengers to wear safety belts and imposes a fine of between $25 and $50 on violators. Tex. Rev. Civ. Stat. Ann. art 6701d. § 107C(b),(e) (West Supp. 1993). Beatty saw that Delapaz was not wearing her

safety belt so he had a legitimate reason to stop the Lincoln.

A routine traffic stop may escalate into a situation in which a police officer develops a reasonable suspicion, based on articulable facts, that a crime is being committed. In such a situation, the police officer may detain the occupants and even search the vehicle, not withstanding that probable cause for a search may not exist. *Kye Soo Lee*, 898 F.2d at 1039-40.

> The two part test . . . to determine whether the less rigorous "reasonable suspicion" standard has been met, is as follows: First, the search and seizure must be justified by reasonable suspicion at the inception of the intrusion. Second, the search and seizure must be reasonably related in scope to the circumstances justifying the intrusion in the first instance.

Id. at 1039. Gilbert-Bey and Delapaz provided Beatty with facts from which he could have inferred that criminal activity was afoot.

Gilbert-Bey and Delapaz were from another state, traveling late at night in a large rental car. Beatty's initial questions about the occupants' identities, their destination, and the rental car were legitimate inquiries during a routine traffic stop. Delapaz and Gilbert-Bey gave vague and seemingly inconsistent answers to those questions. Beatty therefore was justified in asking Gilbert-Bey whether he and Delapaz had any luggage. Beatty further was justified in asking Gilbert-Bey about the contents of

the trunk after Gilbert-Bey raised the police officer's suspicions by stating that he had one bag but Delapaz had no luggage.[1]

Additionally, Beatty asked Gilbert-Bey for permission to look in the trunk. Gilbert-Bey agreed and told Delapaz that Beatty wished to look in the trunk. The record does not indicate that Beatty's request was coercive in nature.

Beatty evidently did not inform Gilbert-Bey and Delapaz that they could refuse his request to search the trunk. The record contains no evidence about Delapaz's education. The record does, however, indicate that Delapaz was sufficiently intelligent to respond appropriately to Beatty's request. Delapaz operated a business at the time of the search, and understood Beatty's request for her driver's license.

Gilbert-Bey and Delapaz may have believed that Beatty would not find the cocaine. The contraband was contained in bags placed in the front of the trunk, behind bags and boxes of children's paraphernalia. *Gonzalez-Basulto*, 898 F.2d at 1013.

Finally, Beatty's search did not go beyond the scope of Delapaz's consent. A general consent to search includes "consent to search containers within that car which might bear drugs." *Florida v. Jimeno*, ___ U.S. ___, 111 S.Ct. 1801, 1804, 114 L.Ed.2d 297 (1991).

---

[1] Because the detention was legal, Gilbert-Bey's contention that Delapaz's consent was the fruit of his illegal detention is unavailing.

B. Mistrial

Gilbert-Bey contends that the district court erred by denying his motion for a mistrial following Agent Black's statement that Gilbert-Bey was known as a drug distributor. His contention is unconvincing.

During cross-examination, defense counsel attempted to elicit testimony from Black that the terminology employed by Gilbert-Bey during a telephone call might not have referred to drugs. Black responded, "[n]o, sir, it is a documented fact that Mr. Walter Harris is a known distributor, as well as Mr. Gilbert-Bey." The district court immediately dismissed the jury. Gilbert-Bey moved for a mistrial. After a brief discussion, the court took the motion under advisement.

The next morning the court denied Gilbert-Bey's mistrial motion. After admonishing Black, the court asked if Gilbert-Bey would like a limiting instruction regarding the comment. Defense counsel accepted the court's offer. Shortly thereafter, the court expressed reservations about the effect of a limiting instruction: The court was concerned that such an instruction might reinforce the comment in the jurors' minds. After consulting with Gilbert-Bey, counsel told the court that a limiting instruction would be unnecessary because counsel would cross-examine Black about the comment.

Counsel then cross-examined Black in the presence of the jury. Black testified that Gilbert-Bey was a self-admitted drug distributor. Black conceded, however, that Gilbert-Bey had no criminal record involving drugs and that Black's testimony about Gilbert-Bey's distribution activities was based on the facts of the case then on trial. Black

conceded that the statement that Gilbert-Bey was a known distributor was false.

> A denial of a motion for mistrial will be reversed only if shown to be an abuse of discretion. To establish an abuse of discretion a defendant must show that the improper material viewed in the context of the whole trial was so prejudicial that it had a substantial impact on the verdict.

United States v. Merida, 765 F.2d 1205, 1220 (5th Cir. 1985) (internal citation omitted). The district court did not abuse its discretion by denying Gilbert-Bey's motion. Defense counsel cured Black's baseless and prejudicial remark through cross-examination. Counsel and the court agreed that under the circumstances a cautionary instruction was unnecessary.

C. Ineffective Assistance of Counsel

Gilbert-Bey next contends that his trial counsel was ineffective for continuing to cross-examine Black after the district court denied the mistrial motion. This contention is without merit.

To prevail on an ineffective-assistance-of-counsel claim, a petitioner must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prove deficient performance, the petitioner must show that counsel's actions "fell below an objective standard of reasonableness." *Id.* at 688. Defense counsel wished to cure the prejudice resulting from Black's remark. He

chose to do so through cross-examination. Counsel's choice was not unreasonable.

D. Comment by the Court

Gilbert-Bey complains that the district court made an impermissible comment on the weight of the evidence in response to a request from the jury. During deliberations, the jury requested the court to instruct it again on the verdict form. In his response, the judge noted:

> For your information, the verdict form requests you to answer as to Count 1, the first paragraph finding the defendant "guilty," or if you find the defendant "not guilty," answer the second paragraph. Then, as to Count 2, you are required to do the same and as to Count 3, you are required to do the same.

The court's response simply does not constitute a comment on the weight of the evidence.

E. Sufficiency of the Evidence

Finally, Gilbert-Bey contends that he was convicted on insufficient evidence. His contention is unavailing.

A reviewing court will affirm a jury verdict if there is evidence sufficient to allow a reasonable jury to find a defendant guilty beyond a reasonable doubt. The reviewing court will view the evidence and all inferences from the evidence in the light most favorable to the verdict. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *aff'd* 462 U.S. 356 (1983).

To convict a defendant of conspiracy to possess drugs with intent to distribute, a jury must find beyond a

reasonable doubt that an agreement that entails violation of federal narcotics laws exists, that the defendant has knowledge of the agreement, and that the defendant voluntarily participated in the agreement. There is no overt-act requirement. *United States v. Ayala*, 887 F.2d 62, 67 (5th Cir. 1989). The jury may infer intent to distribute from proof of possession of a large quantity of drugs. *United States v. Hernandez-Palacios*, 838 F.2d 1346, 1349 (5th Cir. 1988). To convict a defendant of possession with intent to distribute, a jury must find beyond a reasonable doubt that the defendant knowingly possessed drugs and intended to distribute them. *Id.* at 1349. To convict a defendant of transportation with intent to commit a crime, the jury must find beyond a reasonable doubt that the defendant traveled in interstate commerce, intending to commit a crime, and then performed, or attempted to perform, an enumerated criminal act. Drug offenses are enumerated in the relevant statute. 18 U.S.C. § 1952.

Gilbert-Bey told Black that he and Delapaz had flown to Houston from Detroit, intending to traffic in cocaine. He outlined their activities in Houston with their suppliers. He also confessed his involvement to Beatty. Additionally, Beatty found over 20 pounds of cocaine in the trunk of the car that Gilbert-Bey was driving. The evidence is more than sufficient to sustain Gilbert-Bey's conviction.

Finding no reversible error, Gilbert-Bey's conviction is in all respects

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA,	§	
	§	6:92cr24
v.	§	(Filed
	§	
ROSIE GONZALES DELAPAZ	§	Aug. 18, 1992)
and REGINALD THADDEUS	§	
GILBERT-BEY	§	

MEMORANDUM OPINION

Panola County law enforcement officers seized approximately ten kilograms of cocaine from the automobile in which defendants were travelling on the early morning of April 28, 1992. In a three-count superseding indictment, on June 17, 1992, the grand jury charged both defendants with violations of 21 U.S.C. § 846 (conspiracy to violate a controlled substance law); 21 U.S.C. § 841(a)(1) (possession of a controlled substance with intent to distribute); and 18 U.S.C. § 1952 (travelling in interstate commerce in aid of racketeering enterprises). Defendants filed a motion to suppress the evidence to be used against them, and an oral hearing was held pertaining to this motion on July 1, 1992. The motion to suppress was taken under advisement, but supplemental briefs were invited from both sides. On August 3, 1992, defendants submitted a partial transcript of a contemporaneously made recording of the events which had taken place on April 28, 1992. For the reasons set forth in this memorandum opinion, defendants' motion to suppress will be denied.

I. Defendants' Standing to Challenge the Seized Evidence

Norma Cisneros had rented the Lincoln Town car in which defendants were situated on April 28, 1992. The rental agreement listed defendant Rosie Gonzales Delapaz as an authorized driver. However, defendant Reginald Thaddeus Gilbert-Bey, who was not so authorized, was driving the vehicle when it was stopped for a traffic violation in the manner described below. To have Fourth Amendment standing, a defendant must show 1) an actual, subjective expectation of privacy with respect to the place being searched or items being seized, and 2) that the expectation is one that society would recognized [sic] as reasonable. *United States v. Lee*, 898 F.2d 1034, 1037-38 (5th Cir. 1990) (citing *Rakas v. Illinois*, 439 U.S. 128 (1978)). A defendant must prove the above elements by a preponderance of the evidence to establish standing. *See, e.g., United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992). In this case, there are two separate standing issues relating to 1) the initial stop of the vehicle; and, 2) the subsequent search of the automobile.

The intentional stopping of an automobile by a police officer is a seizure within the meaning of the Fourth and Fourteenth Amendments. *Brower v. Inyo*, 489 U.S. 593, 596-97 (1989); *Delaware v. Prouse*, 440 U.S. 648, 653, 661 (1979). As persons lawfully occupying an automobile, both defendants have standing to challenge the stop of their vehicle. *United States v. Erwin*, 875 F.2d 268, 269 n.2 (10th Cir. 1989); *United Sate* [sic] *v. Portwood*, 857 F.2d 1221, 1222 (8th Cir. 1988), *cert. denied*, 490 U.S. 1069

(1989); *United States v. Williams*, 589 F.2d 210, 214 (5th Cir. 1979), *modified on other grounds*, 617 F.2d 1063 (5th Cir. 1980).

On two occasions the United States Court of Appeals for the Fifth Circuit has addressed whether drivers of cars rented to other persons have standing to contest searches of those vehicles. In *Lee*, the court held that "if a person has borrowed an automobile from another, with the other's consent, the borrower becomes a lawful possessor of the vehicle and thus has standing to challenge its search." 898 F.2d at 1038. The *Lee* court found that defendants who had borrowed a truck rented to a third person possessed standing to challenge the search of the truck. The Fifth Circuit later ruled that a rental car driver whose name was not listed on the rental agreement did not have standing to contest a search of the vehicle. *United States v. Boruff*, 909 F.2d 111 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1620 (1991).

While the cases seem in tension, there is one distinguishing element. In *Boruff*, the car's rental agreement specifically provided that lessee did not have authority to give control of the vehicle to any other person. There is no mention of such a restriction in the agreement in *Lee*, and it cannot be presumed that the such a prohibition existed. The rental agreement in the present case also limits operation of the vehicle to authorized drivers. For this reason, *Boruff*, rather than *Lee*, controls here. As an authorized driver, Gonzales Delapaz had a reasonable expectation of privacy in the Lincoln. Since Gilbert-Bey has not proven he was an "authorized driver" within the

meaning of the rental agreement,[1] Gilbert-Bey does not have a reasonable expectation of privacy in the vehicle under *Boruff*, and, consequently, he does not have standing to contest the search of the car.

II. The Events of April 28, 1992

A. The Stop

Just before midnight on April 27, 1992, Panola County Deputy Sheriff Paul Beatty and Panola County Detention Officer Brian Murff were proceeding northbound, in Beatty's patrol car, on U.S. Business 59 towards downtown Carthage, Texas. About a mile south of the city's central square, Beatty came upon a purple Lincoln Town car, also proceeding north on U.S. Business 59, being driven by a man later identified as defendant Gilbert-Bey. Beatty noticed that the Lincoln did not have a license plate in the license plate bracket; however, as Beatty moved closer to the vehicle, he could see a Texas paper tag in the back window.

As the two cars approached the square, the traffic signal at the intersection of U.S. Business 59 and U.S. Business 79 turned red. Intending to turn right onto U.S. Business 79, Beatty drove his patrol car alongside the Lincoln, which was already stopped at the red light. Beatty looked into the vehicle, and discovered that the passenger of the Lincoln, later identified as defendant

---

[1] The agreement limits operation to authorized drivers as defined in paragraph 4 of the agreement, which has not been provided by defendants. A defendant has the burden of proof as to standing and Gilbert-Bey has not proven his.

Gonzales Delapaz, was not wearing her seat belt, in violation of Tex. Rev. Civ. Stat. Ann. art. 6701(d), § 107(C) (West 1992). When the signal light turned green, the Lincoln proceeded north on U.S. Business 59. Because of the layout of the streets at the intersection, Beatty was forced to complete his right turn onto U.S. Business 79. There, he turned his car around to pursue the defendants' vehicle. The Lincoln had followed U.S. Business 59 around the north side of the square, and was about to turn right to continue its northbound route, when Beatty's automobile overtook it. Beatty activated the emergency lights on his vehicle, and stopped the Lincoln on U.S. Business 59, northwest of the square.

A stop based upon the violation of a traffic law for which custodial arrest is not permitted is analogous to the stops authorized by *Terry v. Ohio*, 392 U.S. 1 (1968). *Berkermer v. McCarty*, 468 U.S. 420, 436-440 (1984). Such a stop need be supported only by an officer's reasonable articulable suspicion that the suspect is engaged in illegal activity. *United Stated* [sic] *v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975). Defendants argue that the stop of their vehicle was pretextual and, thereby, illegal, regardless of whether Gonzales Delapaz wore her safety belt. They allege that the real reason Beatty stopped their vehicle was to conduct a drug search, not to issue Gonzales Delapaz a citation for failing to wear her safety belt.

It is beyond dispute that, under federal law,[2] the legality of searches under the Fourth Amendment is to be

---

[2] Whether federal or state law should determine whether a *Terry* stop is reasonable under the Fourth Amendment is unclear. *See United States v. Thomas*, 787 F. Supp. 663, 671-74. (E.D. Tex. 1992). Defendants have not argued that Texas law should apply.

determined by the objective reasonableness officer's conduct without regard to his or her subjective motivation. *See, e.g., Maryland v. Macon*, 472 U.S. 463, 470-71 (1985); *Scott v. United States*, 436 U.S. 128, 137 (1978). In evaluating a charge of pretext, the United States Court of Appeals for the Fifth Circuit looks to whether the officer *could* have made the stop on account of "a legitimate reason." *United States v. Gallo*, 927 F.2d 815, 818 (5th Cir. 1991) (citing *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc) ("so long as the police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry")). Officer Beatty was objectively authorized and legally permitted to stop the Lincoln for the alleged safety belt violation committed by Gonzales Delapaz. Defendants' claims of pretext do not meet the legal standard in the Fifth Circuit. Therefore, under the law of this circuit, the stop of defendants' automobile was not pretextual.[3]

B. The Search of the Car

1. The Testimony

After Deputy Sheriff Beatty halted the Lincoln Town car, he approached the driver and identified himself. Gilbert-Bey tendered a Michigan driver's license to the officer. Beatty informed the defendants that they had been stopped by reason of a safety belt violation. Beatty

---

[3] There is insufficient evidence to establish pretext even under Texas law. *See Thomas*, 787 F. Supp. at 675-76.

explained Texas law regarding safety belts to the defendants, then asked the car's occupants' point of origin. Gonzales Delapaz responded that they were on their way to Texarkana to see her sister. In his contemporaneously prepared incident report and in his testimony, Beatty explained that his suspicions were aroused by this answer, not only because it was an inappropriate response to the question asked, but also because of the nervousness that Gonzales Delapaz was exhibiting.

Upon further inquiry, Beatty learned that the Lincoln Town car driven by Gilbert-Bey was a rental car. Gilbert-Bey furnished the rental agreement papers at Beatty's request and followed Beatty to the rear of the car. Beatty examined the papers and found that the car was rented to Norma Cisneros. Gonzales Delapaz was listed as an additional driver; however, Gilbert-Bey's name did not appear on the papers. The officer asked Gilbert-Bey who his passenger was, and he replied that Gonzales Delapaz was his aunt. At this point, Beatty left Gilbert-Bey at the rear of the Lincoln Town car while he went to speak with Gonzales Delapaz.

Officer Beatty walked to the passenger side of the car and asked Gonzales Delapaz for her identification. She, too, produced a Michigan driver's license. Beatty then began to ask her several questions. First, the Officer asked where her sister lived in Texarkana. Next, he inquired about her relationship with Gilbert-Bey. She explained that he was a friend who worked for her as a driver at her limousine company. Lastly, he asked how long the defendants planned to be in Texarkana. Gonzales Delapaz responded that the rental car had to be returned to Houston by Friday.

Beatty then returned to the back of the car where he asked the same questions of Gilbert-Bey. When asked about the length of their trip, Gilbert-Bey explained that he needed to fly back to Michigan by Monday in order to return to work. He said that he worked at Adcom, Inc., never mentioning any connection with the limousine company allegedly owned by Gonzales Delapaz. Beatty also inquired about Norma Cisneros, the lessee of the Lincoln. Gilbert-Bey explained that Cisneros was a friend who had rented the car for Gonzales Delapaz because the latter did not own a credit card. However, Beatty testified that he saw both a Discover card and a Visa or Mastercard in Gonzales Delapaz' possession while she was searching for her identification.

Lastly, Beatty asked Gilbert-Bey if there were any alcohol or weapons in the car,[4] and if either of the defendants had any luggage. As to the first, Gilbert-Bey explained that he did not "mess with that stuff." Then he said that he had a bag in the back seat, but that his passenger had not brought any luggage with her. Beatty

---

[4] An officer cannot ask questions about drugs and weapons when a driver of an automobile is not free to leave without possessing reasonable suspicion of their presence. *United States v. Turner*, 928 F.2d 956, 959 (10th Cir.), *cert. denied*, 112 S. Ct. 230 (1991). While Gilbert-Bey was not being detained for any legal violation, and was technically free to leave, it is unreasonable to maintain that the driver of a car would feel free to leave a passenger under detention for a seat belt violation at midnight. Arguably Beatty violated the Fourth Amendment by asking Gilbert-Bey this question. However, as explained below in footnote 5, Gonzales Delapaz' consent to search the car was not a fruit of this violation.

found this to be odd because the defendants had represented that they would be staying in Texarkana for several days. Beatty asked Gilbert-Bey if he could "take a look" in the trunk of their car. Gilbert-Bey allegedly responded, "Sure." Further, Beatty testified that Gilbert-Bey walked to the driver's side window and told Gonzales Delapaz that Beatty wanted to look in the trunk. She pressed the trunk release button located inside the glove compartment and Beatty began his search of the Lincoln Town car. He soon discovered two duffle [sic] bags containing what was later identified as ten kilograms of cocaine.

2. Was the Consent Search Valid?

The standard for interpreting consent under the Fourth Amendment is objective reasonableness. *Florida v. Jimeno*, 111 S. Ct. 1801, 1803-04 (1991). It is clear that Beatty asked Gilbert-Bey and obtained permission to search the car. However, as stated above, Gilbert-Bey was not an authorized driver of the Lincoln Town car. Deputy Sheriff Beatty testified that he examined the rental agreement papers himself before he sought consent to search the trunk from Gilbert-Bey; therefore, it should have been clear that Gilbert-Bey's consent to search would not be valid. It is necessary, then, to determine whether Gonzales Delapaz consented to Officer Beatty's search.

According to Officer Beatty's testimony, Gonzales Delapaz did not give verbal consent to search the trunk. Rather, when Gilbert-Bey told her that Beatty wanted to look in the trunk, she opened the glove compartment and pressed the trunk release button. A defendant's actions

can effectively convey consent. For example, in *United States v. Donlon*, 909 F.2d 650, 655 (1st Cir. 1990), the court found that the defendant effectively gave his permission for officers to enter his home by opening the screen door. Similarly, the Court of Appeals for the Fourth Circuit found that a Drug Enforcement Agency agent's search of defendant was consensual when defendant raised his arms in response to the agent's request for permission to pat him down. See *United States v. Wilson*, 895 F.2d 168, 170-72 (4th Cir. 1990). It is inferred that Gonzales Delapaz knew or should have known that pressing the trunk release button would effectively give Officer Beatty access to the contents of the trunk; therefore, under *Jimeno*, it is found that Gonzales Delapaz consented to the search.

The finding that Gonzales Delapaz consented to the search of the trunk marks the beginning rather than the end of the inquiry.[5] The government must show that her consent was, in fact, freely and voluntarily given, based on the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1972). The burden is on the prosecution to so prove by a preponderance of the evidence. *Bumper v. North Carolina*, 391 U.S 543 (1968); *United*

---

[5] Because Gonzales Delapaz actually opened the trunk, it was her consent rather than Gilbert-Bey's that is relevant. Even assuming that defendants are correct that Gilbert-Bey's detention violated *Terry*, such a violation was not a "but-for" cause of the search of the trunk. Moreover, Gilbert-Bey's lack of reasonable expectation of privacy in the trunk makes unnecessary any consideration of the "common authority" doctrine enunciated by the Supreme Court in *United States v. Matlock*, 415 U.S. 164 (1974).

States v. Huratado, 905 F.2d 74, 75-76 (5th Cir. 1990). Defendants argue that the consent to search was not obtained voluntarily and, therefore, was invalid. The United States Court of Appeals for the Fifth Circuit has articulated the six primary factors that must be considered in determining whether consent was voluntary:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of defendant's co-operation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; (6) the defendant's belief that no incriminating evidence will be found.

United States v. Gonzales-Basulto, 898 F.2d 1011, 1013 (5th Cir. 1990) (citing *United States v. Galberth*, 846 F.2d 983, 987 (5th Cir.), *cert. denied*, 488 U.S. 865 (1988)).

When she consented to the vehicle search, Gonzales Delapaz was being detained for investigative purposes in a manner recognized as a seizure under Fourth Amendment. Consent obtained during an investigative detention is not *per se* involuntary. *See Florida v. Royer*, 460 U.S. at 502. However, if an investigative detention becomes an illegal arrest before consent to search is obtained, such consent is neither voluntary nor valid. *Id.; United States v. Zukas*, 843 F.2d 179, 183 (5th Cir. 1988), *cert. denied*, 490 U.S. 1019 (1989). A traffic stop not only must be justified by reasonable suspicion at the inception of the intrusion, but also it must be reasonably related in scope to the circumstances justifying the intrusion in the first instance. *Lee*, 898 F.2d at 1039 (citing *Terry*). The government must prove that both conditions are satisfied. *Royer*, 460 U.S. at

500 (plurality opinion). Defendants argue that their detention was unreasonable and violative of *Terry*.

A routine traffic stop is subject to significant limitations:

> [D]etention of a motorist is presumptively brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but in the end he most likely will be allowed to continue on his way.

Berkermer v. McCarty, 468 U.S. at 437. An investigative detention may last no longer than is necessary to effectuate the purposes of the stop. *Royer*, 460 U.S. at 500 (plurality opinion); *Zukas*, 843 F.2d at 182. When conducting a routine traffic stop, an officer may ask for a driver's license and vehicle registration, run a computer check for warrants, and issue a citation. *United States v. Walker*, 933 F.2d 812, 816 (10th Cir. 1991) (citing *United States v. Guzman*, 864 F.2d 1512, 1518 (10th Cir. 1988)), *cert. denied*, 112 S. Ct. 1168 (1992). Once an officer confirms that a vehicle is not stolen and that the operator has a valid license, the officer's authority is limited to the issuance of a citation or warning. *Id.*

In *Guzman*, the United States Court of Appeals for the Tenth Circuit ruled that consent to search obtained during extensive roadside questioning unrelated to the rationale for the initial traffic stop was invalid. 864 F.2d at 1520. The court held that absent reasonable suspicion, an

officer may not engage in intrusive questioning of vehicle occupants without violating the Fourth Amendment. *Id.* at 1519. The *Guzman* court found that the nervousness of the suspects did not amount to reasonable suspicion. *Id.* at 1520. The court ruled that the officer possessed merely a hunch of criminal activity, which was insufficient to justify intrusive questioning. *Id.*

With due defence [sic] to the officer, there was no reasonable suspicion that defendants were engaged in illegal activity in this case. That two ethnic minorities would be somewhat nervous about being stopped in a small East Texas town by two white police officers at midnight should neither be surprising nor suspicious. Moreover, it would be unreasonable to conclude from Gonzales Delapaz' giving her destination as a response to the officer's inquiry where they had begun their trip that there was any criminal activity. When Officer Beatty began his intrusive questioning regarding the relationship between the vehicle occupants, he possessed only a hunch that there was illegal activity afoot.

However, the situation at bar differs from *Guzman* in one crucial respect. In *Guzman* the intrusive questioning occurred after the traffic stop mechanics had been completed. The Tenth Circuit has interpreted *Guzman* to hold that the constitutional violation occurred because of the added delay the intrusive questions imposed under the circumstances, rather than because of the intrusiveness of the questions asked. *See United States v. Walker*, 933 F.2d 812, 816 n.2 (10th Cir. 1991) (intrusive questioning may well be lawful if it does not delay the time in which a citation will be issued), *cert. denied*, 112 S. Ct. 1168 (1992). Here, the intrusive questioning occurred during the time

in which the mechanics of the traffic stop were proceeding. There is no evidence that the intrusive questioning would have delayed the stop beyond what would have been otherwise necessary, if drugs had not been found. Therefore, it is concluded the asking of intrusive questions did not violate the Fourth Amendment under the circumstances, and that the detention of Gonzales Delapaz was lawful.[6]

Even lawful involuntary custody can weigh against a finding of free and voluntary consent. *See United States v. French*, 965 F.2d 67, 72 (6th Cir. 1992). Here, Deputy Sheriff Beatty had not issued Gonzales Delapaz a citation for the safety belt violation at the time he sought consent to search, and indeed no citation was ever given. Beatty's failure to issue the citation for the traffic violation furnishing the foundation for the initial stop at the time consent was sought does not *per se* transform the Gonzales Delapaz' detention into an illegal arrest. *Cf. Royer*, 460 U.S. at 503 (plurality opinion). However, Beatty's failure to issue the citation is a factor to be considered, because a detained person could form the impression that yielding to the search request might influence the officer to let her off with a warning rather than a costly ticket. Furthermore, a person stopped for a traffic violation assumes that the citation will be issued quickly so that she can continue his [sic] journey and that

---

[6] Of course, an officer can delay a traffic stop by asking intrusive questions at the beginning rather than the end. It may well be that in other circumstances an extended interrogation by intrusive questions during the stop would be found to have unnecessarily and unconstitutionally delayed the mechanics of the stop. But such was not the case here.

a long detention resembling an arrest is unlikely. *Berkermer v. McCarty*, 468 U.S. at 437. Under the circumstances, the first *Gonzales-Basulto* factor weighs against a finding of voluntariness.

Despite defendants' arguments to the contrary, actually coercive police procedures were not present here. The significance of the intrusive questioning was analyzed above. Defendant Gonzales Delapaz cooperated with Officer Beatty. Both of these factors indicate the voluntariness [of] her consent. On the other hand, there is no evidence that she knew that she had the right to refuse consent. Nor did the government produce any evidence regarding her education and intelligence. Finally, there is no evidence upon which to assess whether Gonzales Delapaz knew that incriminating evidence would be found. In this case, the question of voluntariness is quite close. However, under the totality of the circumstances, the government has just met its burden of proof that Gonzales Delapaz' consent was freely and voluntarily given.

3. Was the Search Within the Scope of the Consent?

The scope of consent is measured by what a reasonable person would have understood by the exchange between the officer and the suspect. *Jimeno*, 111 S. Ct. at 1803-04. Here, there was no direct exchange between Beatty and Gonzales Delapaz, who gave the effective consent to search by opening the trunk of the car. Officer Beatty testified that Gilbert-Bey told Gonzales Delapaz that the officer "wanted to look in the trunk." Essentially

the same account is given in the officer's incident report. Upon hearing this, Gonzales Delapaz pushed the button. She did not seek to limit the search in any way. Gilbert-Bey's response of: "that's all there is," to Officer Beatty's coming upon the bags wherein the drugs were found did not amount to a revocation of consent, even assuming Gilbert-Bey had the authority to limit the scope of a search of a car in which he had no reasonable expectation of privacy. *Jimeno* holds that the consent includes closed containers within an automobile, unless the consent has been specifically limited. 111 S. Ct. at 1804. Therefore, the search of the bags was within the scope of Gonzales Delapaz' consent and the discovery of the drugs was lawful.[7]

SIGNED this 18th of August, 1992.

/s/ Wm. Wayne Justice
William Wayne Justice
United States District Judge

---

[7] The discovery of packages routinely used for the transportation of controlled substances provided probable cause for the arrests of the defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA,	§	
	§	6:92cr24(2)
v.	§	(Filed
REGINALD THADDEUS	§	January 13, 1993)
GILBERT-BEY	§	

ORDER

The defendant in this criminal action, Reginald Thaddeus Gilbert-Bey, has brought a supplemental motion to suppress evidence obtained as the result of a search and seizure during a traffic stop. The court issued its memorandum opinion and order denying the defendant's first motion to suppress this evidence on August 18, 1992, after a full evidentiary hearing. On January 11, 1993, the court took further evidence on the issue of Gilbert-Bey's standing to challenge the search and seizure. The additional evidence included the testimony of Rosie Gonzales Delapaz,[1] who did not testify at the initial hearing, and the rental agreement covering the car driven by Gilbert-Bey at the time of the stop.

As discussed in the court's August 18, 1992, order, a person does not have a reasonable expectation of privacy in a rental car, and, consequently, standing to contest a search of that car, unless that person is an "authorized

---

[1] At the time of the first suppression hearing, Ms. Delapaz was a co-defendant of Gilbert-Bey in this criminal action. She has since entered her plea of guilty.

driver" within the meaning of the rental agreement. *See United States v. Boruff*, 909 F.2d 111 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 1620 (1991).

Paragraph 4 of the agreement defines "authorized drivers":

> The Renter and the following validly licensed individuals with Renter's permission . . . may operate the Vehicle: Renter's spouse, employer or co-workers if engaged in business related activities with the Renter; persons parking the Vehicle at commercial establishments; or persons during an imminent life-threatening emergency situation. All other additional Authorized Drivers must appear at the time of rental and be named on the face of this Agreement.

The renter, Norma L. Cisneros, and Delapaz are the only persons whose names appear on the Agreement as additional authorized drivers. Delapaz testified that she had given Gilbert-Bey permission to drive the vehicle from Houston; however, Delapaz's permission did not, and indeed could not, convert Gilbert-Bey to an authorized driver. Furthermore, even if Gilbert-Bey were an employee of Delapaz, as he claims, he would not be an authorized driver under the terms of the agreement. Only employees of the *renter*, Ms. Cisneros, were authorized. Thus, Gilbert-Bey does not have standing to contest the search and seizure. Accordingly, it is

ORDERED that the defendant's supplemental motion to suppress evidence shall be, and it hereby is, DENIED.

SIGNED this 13th day of January, 1993.

/s/ Wm. Wayne Justice
William Wayne Justice
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA	)	Criminal Docket No. 6:92cr24(2)
VS.	)	Tyler, Texas
REGINALD THADDEUS GILBERT-BEY	)	January 19, 1993 (Filed May 21, 1993)

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE WILLIAM WAYNE JUSTICE
UNITED STATES DISTRICT JUDGE, and a JURY

APPEARANCES:

FOR THE GOVERNMENT:	MR. WES RIVERS and MS. MARY ANN COZBY Assistant United States Attorneys 110 North College, Suite 100 Tyler, Texas 75702
FOR THE DEFENDANT, REGINALD THADDEUS GILBERT-BEY	MR. DAN R. HURST Attorney at Law 113 North Spring Avenue Tyler, Texas 75702
COURT REPORTER:	MS. SUSAN SIMMONS, CSR Official Court Reporter 211 West Ferguson, Suite 100 Tyler, Texas 75702 903/592-7125

Proceedings recorded by mechanical stenography; transcript produced by CAT system.

* * *

[p. 190] bringing the drugs in?

A As far as I know, Mr. Gilbert-Bey did know where it was going.

Q In other words, I guess I am missing something here. Are you saying that he already had buyers for these drugs?

A Only Mr. Gilbert-Bey would know that for sure, but, yes, that is what I am saying.

Q Are you saying to the jury that Mr. Gilbert-Bey told you that he had buyers for these drugs?

A He did say that.

Q And are you telling the jury that based on the conversations, here especially on page four, that that indicates that he had buyers, that this individual was one of the buyers?

A Mr. Harris, Mr. Walter Harris was to be one of the buyers. He specifically states here that he will try to help him; that he is not in it right now, but he will try to help him turn it more or less.

Q "Help him turn it", is that the words?

A Sir?

Q Are those the words that he used?

A I don't believe that those are the words, I'll have to find what he exactly used.

Q Basically what he says is that – and looking at [p. 191] page four, and I will use this instead of the tape

because it does reflect the language, coming down there Mr. Gilbert-Bey says: "Is it as tight up there as it is in the city?" Does he not say that?

A That is correct.

Q It doesn't say anything about drugs there, does it?

A Sir, in drug terminology and drug slang, that would mean: Is it tight up there? Meaning, do you have anything or is there not any cocaine or is there not any heroin or is there not any marijuana on the street available that would – that is exactly what that would mean.

Q It could also be talking about jobs?

A No, sir, not in this situation.

Q It could not?

A No, sir, it is a documented fact that Mr. Walter Harris was a known distributor, as well as Mr. Gilbert-Bey.

Q Excuse me, sir?

A Mr. –

THE COURT: Just one moment, if you please, sir. I am going to recess the jury until nine o'clock tomorrow. Please remember the instructions that have been given to you not to discuss the evidence in the case among yourselves. You may leave the courtroom at this [p. 192] time.

(Jury out.)

THE COURT: Is the jury outside?

THE MARSHAL: Yes, Your Honor.

THE COURT: Let the record reflect that the jury has been retired and I ask that the court reporter please repeat to me the last answer that was made by the witness.

He said something to the effect of somebody being a dealer.

THE REPORTER: (Reading) No, sir, it is a documented fact that Mr. Walter Harris was a known distributor as well as Mr. Gilbert-Bey.

THE COURT: A known distributor.

MR. HURST: Your Honor, at this time, I would move for a mistrial.

THE COURT: I am very surprised that this witness would make a statement like that. Here you are an experienced officer and here you are commenting on the defendant's record when it hasn't even been introduced into evidence.

THE WITNESS: Your Honor, could I explain myself? That is not what I meant at all.

THE COURT: Well, I don't know what – I just know what it meant to me. It meant that this is directly [p. 193] relevant to the defendant's character and so far as I know of up until now, that has not been placed in issue.

MR. RIVERS: Your Honor, I don't – I understood the answer, but I think the witness, if allowed to clarify, I mean, he has testified about what the guy had told him that day. Number one, he has told him –

THE COURT: The answer did not require that he state something about the defendant's record and that is what it was.

MR. RIVERS: There is no allegation by the government that this defendant has any prior drug related convictions, Your Honor.

THE COURT: He said he had a record.

THE WITNESS: Sir, can I explain?

THE COURT: Yes, go ahead.

THE WITNESS: What I was responding to, Your Honor, is the conversation – he is asking – the defense is asking me to testify as to the conversation and I am testifying as to the way two people who use street language and distribute narcotics on the street are talking about, and when I am saying documented, what I meant is that he has been arrested and on this. I had no reference to any other arrest whatsoever, that is not what I mean. I am trying to explain myself as to the way [p. 194] they are – the lingo that they are using.

THE COURT: All right. I will ask the reporter to read it back very slowly and clearly one more time, and as loudly as you can, and you might put that microphone up to her.

THE REPORTER: It will take a minute for me to find it.

THE COURT: That is fine.

THE REPORTER: (Reading) No, sir, it is a documented fact that Mr. Walter Harris was a known distributor, as well as Mr. Gilbert-Bey.

THE COURT: Well, I will take your motion under advisement.

The witness may stand down.

(Witness steps down.)

MR. RIVERS: Your Honor, for the record, though I do feel that the record to be complete, prior to this witness' direct testimony, the witness directly inquired, specifically to ensure that he was trying to stay out of – of anything to do with prior record, and I would ask that the Court take that into consideration and that the Court also consider, not only the answer, but the whole series of questions that – that preceded that answer, and consider it in context.

THE COURT: Court is adjourned.

[p. 195] MR. HURST: Your Honor – excuse me, Your Honor, my client requests I put before the Court one more motion, since the Jury is not present.

THE COURT: Well, you can put it in writing.

MR. HURST: Yes, sir.

THE COURT: Court is adjourned.

* * *

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a correct transcript from the stenographic notes and electronic sound recording of the proceedings in the above-entitled matter to the best of my ability.

/s/ Susan Simmons, CSR
SUSAN SIMMONS, CSR
Official Court
Reporter State of
Texas No.: 267

May 20, 1993
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA	*	Criminal Docket No. 6:92cr24(2)
VS.	*	Tyler, Texas
REGINALD THADDEUS GILBERT-BEY	*	January 20-21, 1993 (Filed May 21, 1993)

TRANSCRIPT OF TRIAL BEFORE THE HONORABLE WILLIAM WAYNE JUSTICE UNITED STATES DISTRICT JUDGE, and a Jury

APPEARANCES:

FOR THE GOVERNMENT:	MR. WES RIVERS and MS. MARY ANN COZBY Assistant U.S. Attorneys 110 North College Street Tyler, Texas 75702
FOR THE DEFENDANT, REGINALD THADDEUS GILBERT-BEY:	MR. DAN R. HURST Attorney at Law 110 North Spring Street Tyler, Texas 75702
COURT REPORTER:	MS. SUSAN SIMMONS, CSR Official Court Reporter 221 West Ferguson, Suite 100 Tyler, Texas 75702 903/592-7125

Proceedings recorded by electronic sound recording, transcript produced by transcriber on computer.

[p. 2] (Jury out.)

THE COURT: Please be seated. The record will reflect that the Jury has not been called into the courtroom at this point.

The Court has before it a motion for a mistrial made by the defendant on yesterday afternoon, because of the statement of the witness: "No, sir, it is a documented fact that Mr. Walter Harris was a known distributor, as well as Mr. Gilbert-Bey." The Court has concluded that at least at this time the motion will be denied. I will take it up – if the defendant is convicted, I will take it into consideration in determining the strength of the case against the defendant, which is one of the factors which is involved in the case of *United States versus Merida*, M-e-r-i-d-a, 765 Federal 2d 1205 at 1220 and 1221, a decision of the Fifth Circuit in 1985.

I am very disturbed by this incident. I recall that in the case of United States against Manziel this particular witness did the same kind of thing, and it caused me to declare a mistrial.

Mr. Black –

MR. BLACK: Yes, sir.

THE COURT: Please rise. You now have a record with me. If in any future case you ever do anything like [p. 3] this again, you may expect severe sanctions from the Court. Do I make myself clear?

MR. BLACK: Yes, sir.

THE COURT: All right. you may be seated.

Let me inquire of the defendant's Counsel and the defendant. Do you want me to give some kind of a cautionary instruction to the Jury?

MR. HURST: Your Honor, I believe that that would be appropriate. Additionally, my client has requested that I place some other matters on the record before the Jury enters.

THE COURT: All right. Go ahead.

MR. HURST: Your Honor, defendant wishes that I advise the Court that he was brought in yesterday by the Marshals from the side door, clearly in custody of the Marshals while the Jury was seated and that it's his position that that has created a taint in the Jury's mind as to the fact that he is in legal custody and, therefore, it would indicate that he is some sort of a dangerous person, and he believes that it is a taint which at this point in time cannot be overcome by any instruction, and on that basis moves for a mistrial.

Further, he would like it placed into the record that he continues at this time to object to Counsel's representation of him in court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4400

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REGINALD THADDEUS GILBERT-BEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

(JANUARY 20, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ J. Wiener
United States Circuit Judge
